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IN THE COURT OF APPEALS OF INDIANA

JESSE ORTIZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0607-CR-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0410-FA-102

August 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Jesse Ortiz appeals his convictions and sentence for two counts of child molesting as class A felonies.[1] Ortiz raises five issues, which we consolidate and restate as:

I. Whether Ortiz is entitled to a new trial due to the State's failure to disclose the victim's medical records;

II. Whether the evidence is sufficient to sustain Ortiz's convictions; and

III. Whether the trial court sentenced Ortiz in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied; and

IV. Whether Ortiz was denied the effective assistance of trial and appellate counsel.

We affirm.

The relevant facts follow. A.O. was born in February 1990 to Ortiz and Nora Ortiz. After Ortiz and Nora divorced, A.O. and her brothers spent every other weekend with Ortiz. At one point Ortiz was living with his sister, and A.O. and her brothers would all sleep in Ortiz's bedroom and often all slept in the same bed with Ortiz.

When A.O. was eleven or twelve years old, she was downstairs playing pool with her brothers when Ortiz told her to go upstairs and go to sleep. Ortiz went upstairs to his bedroom with A.O. and locked the door. While they were on the bed, Ortiz pulled A.O.'s pants down and put his penis in her vagina. She told him that she "didn't want to do that," and he responded, "it's okay; I'm almost done." Transcript at 64. He told her that

[1] Ind. Code § 35-42-4-3(a) (2004).

he was "doing it because he's a good dad." Id. at 64-65. On another occasion, Ortiz also placed his mouth on A.O.'s vagina.

A.O. did not tell anyone because she was afraid that she would get in trouble. Ortiz told her that she would get in trouble. A.O. eventually told her mother that she did not want to stay with Ortiz anymore. In June 2004, A.O. told a psychological assistant at a juvenile detention center that she had been molested. Also, at some point, A.O. was watching a program about molestation with her mother and brother. A.O.'s mother asked if "anything . . . like that ever happened to" them, and A.O. told her mother about the molestation. Id. at 71. Her mother took A.O. to the Madison Center and also took her to see a doctor at the St. Joe Medical Center for an examination.

The State charged Ortiz with one count of child molesting as a class A felony for placing his penis in the sex organ of A.O. and one count of child molesting as a class A felony for placing his mouth on the sex organ of A.O. At Ortiz's jury trial, A.O. testified that the molestation incident that she described was not the first time Ortiz had molested her. The jury found Ortiz guilty as charged. The trial court sentenced Ortiz to forty years in the Indiana Department of Correction for the child molesting conviction involving the intercourse and suspended twenty years of that sentence but ordered Ortiz to serve those twenty years in the Indiana Department of Correction as a condition of probation. The trial court left open the possibility of a sentence modification at the end of the first twenty-year portion of the sentence. The trial court ordered Ortiz to serve twenty years on the remaining conviction and then ordered that the sentences be served consecutively.

I.

The first issue is whether Ortiz is entitled to a new trial due to the State's failure to disclose the victim's medical records. "Due process requires the State to disclose to the defendant favorable evidence which is material to either his guilt or punishment." Stephenson v. State, 742 N.E.2d 463, 491 (Ind. 2001) (citing Kyles v. Whitley, 514 U.S. 419, 432, 115 S. Ct. 1555, 1565 (1995), and Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-1197 (1963)), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002). The suppression of evidence by the State that is favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Shanabarger v. State, 798 N.E.2d 210, 217 (Ind. Ct. App. 2003), trans. denied. "To establish a Brady violation, the defendant must satisfy the following factors: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." Id. at 217-218. "Additionally, a Brady violation arises if the defendant, using reasonable diligence, could not have obtained the information." Id. at 218. Exculpatory evidence has been defined as that which clears or tends to clear a defendant from alleged guilt. Id. "Evidence will be considered material under Brady only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. "Put another way,

the defendant must show that the evidence at issue reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id.

Here, Ortiz argues that the State failed to provide him with A.O.'s medical records from the St. Joe Medical Center. Ortiz includes these medical records in his Appellant's Brief and in his Appendix. However, these medical records are not part of the record in this case, and the State has moved to strike pages 10-11 of the Appellant's Brief and pages 176-184 of Appellant's Appendix. In general, matters not contained in the record are not proper subjects for review.[2] See Turner v. State, 508 N.E.2d 541, 543 (Ind. 1987), reh'g denied; Herron v. State, 808 N.E.2d 172, 178 (Ind. Ct. App. 2004), trans. denied. Consequently, in a separate order, we grant the State's motion to strike.

Because we strike A.O.'s medical records, the record presented on appeal does not demonstrate that the medical records were exculpatory or impeaching. As a result, Ortiz's argument fails. See, e.g., Williams v. State, 808 N.E.2d 652, 665 (Ind. 2004) (rejecting the defendant's Brady claim).

II.

The next issue is whether the evidence is sufficient to sustain Ortiz's convictions for two counts of child molesting as class A felonies. When reviewing claims of

[2] Moreover, we note that under Ind. Appellate Rule 50(B)(1)(f), Ortiz's counsel was required to "verify under penalties of perjury that the documents in this Appendix are accurate copies of parts of the Record on Appeal," which he did. However, A.O.'s medical records were not part of the Record on Appeal. See Ind. Appellate Rule 27 ("The Record on Appeal shall consist of the Clerk's Record and all proceedings before the trial court or Administrative Agency, whether or not transcribed or transmitted to the Court on Appeal.").

insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of child molesting as a class A felony is governed by Ind. Code § 35-42-4-3(a), which provides: "A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if: (1) it is committed by a person at least twenty-one (21) years of age . . . ." Under one of the charges, the State was required to prove that Ortiz, who was at least twenty-one years of age, performed sexual intercourse with A.O., who was under fourteen years of age. Under the other charge, the State was required to prove that Ortiz, who was at least twenty-one years of age, performed deviate sexual conduct with A.O., who was under fourteen years of age. "Deviate sexual conduct" means "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9.

According to Ortiz, A.O.'s testimony was incredibly dubious. "Under the 'incredible dubiosity' rule, however, a reviewing court may impinge on the fact-finder's responsibility to judge witness credibility when 'a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a

complete lack of circumstantial evidence of the defendant's guilt." Corbett v. State, 764 N.E.2d 622, 626 (Ind. 2002) (quoting Tillman v. State, 642 N.E.2d 221, 223 (Ind. 1994)). A.O.'s testimony does not fit into the incredible dubiosity rule. Although Ortiz argues that there is a lack of circumstantial evidence and points to inconsistencies between A.O.'s testimony and the testimony of other witnesses, he makes no argument that A.O.'s testimony regarding the molestations was inherently contradictory, equivocal, or the result of coercion. A.O. testified that, when she was eleven or twelve years old, Ortiz pulled A.O.'s pants down and put his penis in her vagina. On another occasion, Ortiz also placed his mouth on A.O.'s vagina. It is well settled that "the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal."[3] Pinkston v. State, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), trans. denied. We conclude that the State presented evidence of probative value from which a reasonable jury could have found Ortiz guilty beyond a reasonable doubt of two counts of child molesting as class A felonies. See, e.g., Prickett v. State, 856 N.E.2d 1203, 1207 (Ind. 2006) (holding that the evidence was sufficient to sustain the defendant's convictions for child molesting).

III.

[3] Ortiz argues that "Biblical and Anglo American law that once derived from it used to require two or three witnesses to establish a fact. . . . Islamic law is well known to require four (4) witnesses[.]" Appellant's Brief at 16-17. The State correctly notes that "[i]t is irrelevant whether Biblical law, Islamic law, or older Anglo-American law used to require multiple witnesses to establish a fact. Modern Indiana law does not, but instead clearly holds that a single witness' uncorroborated testimony is sufficient to sustain a conviction." Appellee's Brief at 18.

The next issue is whether the trial court sentenced Ortiz in violation of Blakely. On June 24, 2004, the United States Supreme Court decided Blakely, which held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. Blakely, 542 U.S. at 303-304, 124 S. Ct. at 2537; Cotto v. State, 829 N.E.2d 520, 527 n.2 (Ind. 2005). In Smylie v. State, the Indiana Supreme Court held that Blakely was applicable to Indiana's sentencing scheme and required that "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005). The Indiana Supreme Court has noted that "Blakely and the later case United States v. Booker[, 543 U.S. 220, 125 S. Ct. 738, 756 (2005),] indicate that there are at least four ways that meet the procedural requirements of the Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005).

> [A]n aggravating circumstance is proper for Blakely purposes when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted to by a defendant; or 4) stipulated to by the defendant, or found by a judge after the defendant consents to judicial fact-finding, during the course of a guilty plea in which the defendant has waived his Apprendi rights.

Id. at 936-937 (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

While the trial court's sentencing statement is not altogether clear regarding the aggravators it considered, the parties agree that the trial court used Ortiz's position of trust as A.O.'s father as an aggravating factor. Ortiz argues that this aggravator was not presented to the jury and that Ortiz did not admit that he was in a position of trust with

A.O. We disagree. During the sentencing hearing, Ortiz told the trial court that his "daughter" had lied during her testimony about the medical records. Sentencing Transcript at 38. We conclude that Ortiz admitted that A.O. was his daughter and, thus, that he was in a position of trust with her. See, e.g., Trusley, 829 N.E.2d at 926 (holding that the trial court properly considered the defendant's position of trust as an aggravator where the defendant admitted at the sentencing hearing that she was the victim's day care provider); Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) ("There is no greater position of trust than that of a parent to his own young child.").

IV.

The final issue is whether Ortiz was denied the effective assistance of trial and appellate counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that he was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Id.

Ortiz first claims that his trial and initial appellate counsel were ineffective for failing to file a motion to correct error based upon newly discovered evidence, specifically, A.O.'s medical records from St. Joe Medical Center. According to Ortiz, the medical records demonstrate that A.O. had no physical trauma.

As noted above, the medical records were included in Appellant's Appendix, but we have stricken the records because they were not properly part of the record on appeal. Consequently, Ortiz has failed to meet his burden of demonstrating the content of the medical records and has failed to meet his burden of demonstrating that he was prejudiced as a result of the alleged ineffective assistance of counsel. Moreover, even if we assume that the medical records demonstrate that A.O. had no physical trauma, we conclude that Ortiz has failed to demonstrate any prejudice. The examination took place two years after the molestation ended. The investigating detective testified that, where a child delays in disclosing a molestation, a "very low" percentage of those cases result in physical findings in the medical examination. Transcript at 188. Ortiz has failed to demonstrate that there is a reasonable probability that, but for trial and initial appellate counsels' failure to file a motion to correct error regarding the medical records, the result of the proceeding would have been different. See, e.g., French, 778 N.E.2d at 825 (holding that the petitioner failed to meet his burden of proof that there was a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

Next, Ortiz argues that his trial counsel was ineffective because he offered no exhibits or witnesses, filed no motions in limine, made no hearsay or leading objections, introduced on cross examination of A.O. evidence that the molestations began when she was seven or eight years old, and failed to argue Blakely at sentencing.[4] There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002), reh'g denied, cert. denied, 540 U.S. 830, 124 S. Ct. 69 (2003). Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. Id. at 746-747. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. at 747. A defense counsel's poor trial strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. Crain v. State, 736 N.E.2d 1223, 1239 (Ind. 2000).

First, we note that Ortiz does not identify which exhibits his trial counsel should have sought to admit, which objections his trial counsel should have made, and which motions in limine his trial counsel should have filed. As a result, Ortiz has waived these issues. See, e.g., Smith v. State, 490 N.E.2d 300, 305 (Ind. 1986) (holding that the

[4] Ortiz also argues that trial counsel failed to seek an independent medical exam. Ortiz makes no cite to the record for this proposition, and our review of the record reveals no evidence concerning this argument.

defendant waived any argument that his trial counsel did not object during the trial a sufficient number of times by failing "to point out any specific time or grounds for objections overlooked by his counsel").

As for Ortiz's claim that his trial counsel failed to call any witnesses, the only proposed witness that Ortiz mentions is his sister, with whom he was living at the time of the molestation. The law is well settled that a decision regarding what witnesses to call is a matter of trial strategy that an appellate court will not second guess. Brown v. State, 691 N.E.2d 438, 447 (Ind. 1998). We will not second guess trial counsel's decision not to call Ortiz's sister. Moreover, Ortiz does not identify what relevant, admissible testimony his sister would have given or how he was prejudiced by his trial counsel's failure to present the testimony. See, e.g., Driver v. State, 725 N.E.2d 465, 469-470 (Ind. Ct. App. 2000) (rejecting defendant's claim of ineffective assistance of counsel for his trial counsel's failure to call witnesses where the defendant failed "to establish how the failure to call those witnesses was unreasonable and how the failure to call those witnesses rendered the outcome of the proceedings fundamentally unfair or unreliable").

As for Ortiz's claim that his trial counsel failed to raise Blakely at the sentencing hearing, the extent of Ortiz's argument is that "defense counsel never even challenged the Apprendi, Blakely or Smylie, infra, arguments at sentencing." Appellant's Brief at 16. Although the argument is not clear, we assume that Ortiz is arguing that his trial counsel should have challenged the use of his position of trust as an aggravator based upon Blakely. We have already addressed and rejected Ortiz's argument that his position of

trust could not be used as an aggravator under Blakely. See supra Part III. Ortiz has failed to demonstrate that he was prejudiced by his trial counsel's failure to raise this issue at the sentencing hearing. To the extent Ortiz is attempting to make other ineffective assistance of counsel arguments regarding his sentencing hearing, we conclude that he has failed to present a cogent argument in support of his claim and has waived the issue. See Ind. Appellate Rule 46(A)(8)(a).

Finally, as for Ortiz's claim that his trial counsel was ineffective for introducing on cross examination of A.O. evidence that the molestations began when she was seven or eight years old, we note that, during the State's direct examination of A.O., she testified she was alone with Ortiz in the bedroom "[a] lot of times," the molestation at issue was not the "first time," she could not remember the first time, and Ortiz told her many times that he was going to stop but he did not stop. Transcript at 61-62, 66. Thus, prior to cross examination, it was already clear that A.O. was alleging that Ortiz molested her many times prior to the incident at issue when she was eleven or twelve years old.

Considering trial counsel's performance as a whole, we note that Ortiz's trial counsel made opening and closing statement, extensively cross examined witnesses, successfully objected to the admission of A.O.'s videotaped interview, and raised objections to jury instructions. During his cross examination of A.O., Ortiz's trial counsel questioned A.O. extensively about inconsistencies in her allegations. During his closing statement, trial counsel pointed out inconsistencies in A.O.'s testimony as compared to the testimony of other witnesses. We conclude that, as a whole, Ortiz has

not persuaded us that his counsel's performance fell below an objective standard of reasonableness. Accordingly, he cannot succeed on his claim that he received ineffective assistance of counsel. See, e.g., Brightman v. State, 758 N.E.2d 41, 47 (Ind. 2001) (rejecting the defendant's ineffective assistance of counsel claim).

For the foregoing reasons, we affirm Ortiz's convictions and sentence for two counts of child molesting as class A felonies.

Affirmed.

MAY, J. and BAILEY, J. concur